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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ALABAMA, PETITIONER

v.

JAMES LEWIS SMITH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The respondent in this case entered a guilty plea and was sentenced. Subsequently, he withdrew his guilty plea, went to trial, and was convicted. The trial court then sentenced respondent to a longer term of imprisonment than the court had imposed following respondent's guilty plea. The question presented is whether that sentence was "vindictive" under the principles articulated in this Court's decision in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).

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INTEREST OF THE UNITED STATES

This case involves the application of the presumption of "vindictiveness" under *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), a presumption that applies equally to federal criminal cases. The question presented is whether, under *Pearce*, a defendant who withdraws his guilty plea and is convicted after trial may be given a greater sentence than the one he received following his guilty plea. That question arises routinely in the federal system. Moreover, under the recently promulgated Sentencing Guidelines, federal judges are entitled to impose a more lenient sentence on a defendant who, by pleading guilty, has demonstrated an "acceptance of responsibility" for his offense. United

States Sentencing Comm'n, *Sentencing Guidelines and Policy Statements* § 3E1.1(a), (c), Commentary (1988). The United States therefore has a continuing interest in the question whether *Pearce* forbids a court from sentencing a defendant who does not plead guilty more harshly than one who does.

STATEMENT

1. In November 1985, respondent was charged, in three separate indictments, with first degree sodomy, first degree rape, and first degree burglary. All three charges arose from respondent's September 14, 1985, assault on Vickie Hurst. C.A. App. 415-423. On January 6, 1986, respondent entered a guilty plea to the rape and burglary charges. In his allocution, respondent acknowledged that at about 1:30 a.m. on the date in question, he went to Ms. Hurst's house, cut through a screened window, and, holding a knife, had "ha[d] sex" with his victim. In exchange for respondent's plea to the two charges, the State moved to dismiss the sodomy charge. The trial court granted that motion and accepted respondent's guilty plea. 1/6/86 and 1/17/86 Tr. R-3 to R-4, R-14 to R-20.

On January 17, 1986, respondent appeared before the trial court for sentencing. The court had already received presentence reports concerning the offense (J.A. 27, 37), which stated that respondent had "broke[n] into the residence of Vickie Hurst * * * while [she] and her three children were at home" and had forced Ms. Hurst "to engage in oral intercourse * * * [and] sexual intercourse with him." The sentencing court also heard from Ms. Hurst, respondent's victim, who advised the court of her fear that if respondent "[got] out, he [would] do it again." The trial court imposed concurrent terms of 30 years' imprisonment on each charge. 1/6/86 and 1/17/86 Tr. R-20 to R-28.

Respondent thereafter moved to withdraw his guilty plea, contending that he had not entered it knowingly or voluntarily. The trial court denied that motion, but the Alabama Court of Criminal Appeals reversed and remanded. It held that respondent had not been accurately apprised of the penalties associated with the crimes to which he had pleaded guilty. Pet. App. 2; *Smith* v. *State*, 494 So. 2d 182 (1986).

2. On remand, the State moved to reinstate the previously dismissed charge of first degree sodomy. The trial court granted that motion, and respondent proceeded to trial on all three original charges. Pet. App. 2.

At trial, Ms. Hurst testified that on September 13, 1985, after putting her three children to bed across the hall, she was in her room watching television. In the early morning hours, she heard a noise in the hallway. She looked up and saw a man, later identified as the respondent, with a mask pulled over his face. The man was dressed only in his underwear, and he was carrying a kitchen knife with a shiny blade and a wooden handle. Respondent ran toward Ms. Hurst with the knife, put his hand over her mouth, pulled her down onto the bed, and removed her underwear. Holding the knife to Ms. Hurst's chest, and later placing it beside her on the bed, respondent then forced his victim to have intercourse with him at least four times and "in different positions." In addition, respondent forced Ms. Hurst to perform oral sex on him and to permit him to do the same to her.[1] In all, respondent's attack on

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[1] Ms. Hurst explained that each time that respondent moved to a new position, she would ask him not to rape her again. Respondent told her he was not raping her, but was only "doing what [he] always wanted to do." C.A. App. R-136 to R-137.

his victim lasted more than one hour. C.A. App. R-126 to R-146.[2]

The State also offered respondent's post-arrest statement, in which respondent admitted many of the details of the offenses. For example, in his statement respondent acknowledged that he had entered Ms. Hurst's apartment, while dressed in his underwear, with a cap pulled over his face, and carrying a knife. He also admitted that he had gotten into Ms. Hurst's bed and that he had had intercourse with her. Respondent asserted in this statement, however, that Ms. Hurst did not resist having intercourse with him; and although he acknowledged that he had tried to have oral sex as well, he claimed that he had acceded to Ms. Hurst's refusal to do so. Respondent stated that he had gone to Ms. Hurst's apartment because he had "felt empty" and "wanted to be loved." C.A. App. R-197 to R-203.

Respondent took the stand at trial and claimed that he had been in bed with his girlfriend at the time the rape took place (C.A. App. R-283 to R-284). He explained that he had offered the confession to the police only "because the two officers that questioned [him had] set themselves up as judge and jury and [had] offered [him] no self defense, legal representation" (*id.* at R-303). Respondent characterized his statements to the police as "running off at the mouth" (*id.* at R-301) and "just babble" (*id.* at R-305).

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[2] Ms. Hurst also testified that she had recognized respondent, who was one of her neighbors, from the sound of his voice during the attack (C.A. App. R-143). Confirming the point, the evidence showed that four days after the offense, Ms. Hurst selected respondent's voice from a "voice lineup," in which five persons, including respondent, were required to speak certain of the words that, according to Ms. Hurst, had been spoken by the assailant (*id.* at R-156 to R-157, R-190 to R-193).

Respondent was convicted on all three charges (C.A. App. R-393), and on August 22, 1986, he appeared a second time for sentencing before the trial court. The court imposed concurrent terms of life imprisonment on the burglary and sodomy convictions and a consecutive term of 150 years' imprisonment on the rape conviction (*id.* at R-396, R-403 to R-404). The trial court explained that at the time the court sentenced respondent on his guilty plea, respondent had told the court only "[his] side of the story" (Pet. App. 28). "[N]ow," the court stated, "the court has had a trial and heard all of the evidence," including the "testimony which consisted of raping the victim at least five times," and evidence showing respondent's "mental outlook on it and [his] position during the trial" (*id.* at 28-30). Although the court emphasized that it was not increasing respondent's sentence based "on the fact that [he] was successful on [his] appeal" (*id.* at 28), it concluded that it was "proper to increase the sentence beyond that which was given to [respondent] on the plea bargain" (*id.* at 30).[3]

3. The Court of Criminal Appeals affirmed respondent's convictions, as well as his life sentences for sodomy and burglary, while remanding the rape conviction for resentencing. The Alabama Supreme Court thereafter granted respondent's request for review of the burglary sentence, and it reversed and remanded by a divided vote (Pet. App. 1-14). The court held that " 'there can be no

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[3] In response to defense counsel's claim that the sentences were excessive (C.A. App. R-409), the trial court observed that at the time of the initial sentencing it had had "no knowledge that [respondent] raped the woman five times" and "sodomized her twice * * * with the children across the hall, with the knife basically at her throat at all times * * * at 1:00 or 2:00 a.m. with a ski mask on" (*id.* at R-410 to R-411). The court stated that, in retrospect, the sentence that it had imposed the first time "may not have been harsh enough" (*id.* at R-411).

increase in a sentence in a criminal case after the sentence is imposed' " (Pet. App. 5 (citation omitted)). To increase a sentence under those circumstances, the court reasoned, would " 'den[y] the prisoner the protection of his original sentence as a condition to the right of his appealing his conviction or exercising his post-conviction remedies' " (*ibid.* (citation omitted)). The court acknowledged that in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court held that " '[a] trial judge is not constitutionally precluded * * * from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities" ' " (Pet. App. 5-6 (quoting 395 U.S. at 723)). But the court construed the language in *Pearce* to authorize an increased sentence only when it is justified by "events subsequent to the first trial" (*id.* at 7). Because the trial court had increased respondent's sentence based on the evidence adduced at the trial, the court set aside respondent's sentence on the burglary conviction.

Justice Maddox dissented (Pet. App. 8-14). In his view, "the principles of *North Carolina* v. *Pearce* * * * [do] not apply" where the original sentence follows a voluntary guilty plea (*id.* at 9-10). Justice Maddox explained that a defendant "should not be allowed to receive sentence concessions in return for a guilty plea and then, after a successful attack on that plea, bind the State to its original sentencing bargain if he is later convicted after a trial" (*id.* at 14). Were the law otherwise, he stated, a defendant "could go to trial and chance an acquittal knowing he could receive a sentence no harsher than he was originally given" (*ibid.*).[4]

[4] The Alabama Supreme Court subsequently denied the State's application for rehearing (Pet. App. 15). Justice Maddox again dissented (*id.* at 15-27). He explained (*id.* at 26) that "[a] defendant is free to accept or reject the [plea] offer of the State. Once it is rejected, however, the defendant cannot complain that the denial of the benefits of the offer he rejected constitutes punishment or evidences judicial vindictiveness."

SUMMARY OF ARGUMENT

In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court held that before a trial court may increase a sentence following a criminal defendant's exercise of a post-conviction right of review, the increased penalty must be justified by a showing of legitimate, non-vindictive motivating factors. Relying on *Pearce*, the Alabama Supreme Court held that a trial court may not impose on a defendant who was convicted at trial a harsher sentence than the one the court imposed after the defendant pleaded guilty. That holding extends *Pearce* to a precinct in which it was never meant to apply.

A. This Court has made clear that the presumption of vindictiveness articulated in *Pearce* must be confined to the special context in which that case arose. The Court has explained that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of 'vindictiveness.' " *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974). Thus, the Court has always restricted the application of *Pearce* "to areas where its 'objectives are thought most efficaciously served.' " *Texas* v. *McCullough*, 475 U.S. 134, 138 (1986) (citation omitted).

B. For three reasons, a reviewing court should not presume vindictiveness in the context presented by this case.

First, a trial on the merits will usually afford the trial court a more complete account of the crime than is provided by a simple plea allocution. For that reason, a court that has heard all the evidence at a full trial on the

merits will often be in a better position to impose an appropriate sentence than it was after a guilty plea. The court's decision to impose a stiffer sentence after a full trial is thus likely to be the product of better information—as it was in this case—and not the product of judicial vindictiveness.

Second, a defendant who has pleaded guilty, and who has thereby acknowledged his responsibility for an offense, may well deserve a more lenient sentence. This Court and others have routinely approved more favorable sentencing treatment for defendants whose guilty pleas reflect contrition and personal accountability. By contrast, a defendant who has gone to trial may well not have earned specially lenient sentencing treatment, particularly if the defendant—in the judgment of the sentencing court—gives false testimony at trial. A difference in treatment between a defendant who has pleaded guilty and one who has gone to trial is therefore entirely legitimate and does not warrant a presumption of vindictiveness.

Finally, these two reasons suggest a third, more general one: a presumption of vindictiveness in this setting is fundamentally incompatible with the accepted role of plea bargaining in the criminal justice system. Under the Alabama Supreme Court's view, a defendant who has been sentenced based on a plea bargain may withdraw from that plea and proceed to trial, running no risk that he may be sentenced more severely than he was the first time. Such an application of the rule in *Pearce* would entirely remove a defendant's incentive to enter into binding plea agreements.

C. Even if a presumption of vindictiveness were appropriate in this case, the trial court's findings easily overcome that presumption. The trial court explained that it imposed a harsher sentence because the evidence at trial showed respondent's crime to be far more serious than the

court had previously supposed. The Alabama Supreme Court held (Pet. App. 4) that the trial court did not rely on an "event[] subsequent to the [respondent's] first conviction" and that its findings therefore did not satisfy the burden imposed by *Pearce*. That conclusion, however, is flatly inconsistent with this Court's decision in *Texas* v. *McCullough*, 475 U.S. at 141-144. In that case, the Court upheld a heavier sentence following a second trial, where that sentence was based on additional facts about the underlying offense that emerged, for the first time, at the second trial.

ARGUMENT

A DEFENDANT WHO WITHDRAWS HIS GUILTY PLEA AFTER HE HAS BEEN SENTENCED MAY CONSTITUTIONALLY BE SUBJECTED TO AN INCREASED SENTENCE FOLLOWING HIS CONVICTION AT TRIAL

A. Vindictiveness May Be Inferred Only In Those Special Contexts In Which There Is A Realistic Possibility That The Defendant's Sentence Has Been Increased To Penalize Him For Exercising A Legal Right

1. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court reviewed the actions of state trial judges who had increased two defendants' sentences after the defendants successfully invoked post-conviction review procedures and obtained reversals of their convictions. The Court concluded that the Due Process Clause limits the imposition of harsher sentences on retrial after a successful appeal. In one of the cases, the Court found it "inescapable" that the trial judge was "punishing [the defendant] for having exercised his post-conviction right of review" (*id.* at 726); in the other case, no "reason or justification" was suggested for the increased sentence "beyond the naked power to impose it" (*ibid.*). In analyzing the enhanced sentences in those cases, the Court explained that imposing a more severe sentence "for the ex-

plicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside" would violate the Due Process Clause (*id.* at 723-724). The Court noted, however, that the "existence of a retaliatory motivation" would be "difficult to prove in any individual case" (*id.* at 725 n.20). In view of the clear hazard that vindictiveness motivated the sentences before it, and the difficulty in obtaining reliable proof on that issue, the Court adopted a special prophylactic rule (*id.* at 726):

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), this Court adopted a similar prophylactic rule, to guard against vindictiveness by the prosecutor at the post-conviction stage. In that case the defendant sought a trial de novo in a state superior court following his initial misdemeanor conviction. The prosecutor responded immediately to the exercise of that post-conviction right by obtaining a felony indictment, which resulted in a sentence after conviction of five to seven years' imprisonment. The Court concluded that "the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Id.* at 27. The Court reached that conclusion only after finding that there was a "realistic likelihood of 'vindictiveness,' " because the "prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo*." *Ibid.* In this context,

the Court ruled that "it was not constitutionally permissible for the State to respond to [the defendant's] invocation of his statutory right to appeal by bringing a more serious charge" (*id.* at 28-29), absent a showing that would dispel the appearance of vindictiveness, such as a demonstration "that it was impossible to proceed on the more serious charge at the outset." *Id.* at 29 n.7.

2. While recognizing that a presumption of vindictiveness is appropriate in settings such as those presented in *Pearce* and *Perry*, the Court has made clear that the presumption should not be applied outside the special contexts in which it was developed. The Court has therefore refused to extend the presumption to cases in which it was not likely that the increase in penalty exposure was triggered by the exercise of a procedural right, or in which an increase, even if triggered by the exercise of a procedural right, serves a legitimate purpose apart from penalizing the accused for exercising a procedural right.

In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), for example, this Court declined to extend the prophylactic sentencing rule prescribed in *Pearce* to a two-tier prosecution system in which the defendant was first convicted in an inferior court and then appealed to a court of general jurisdiction for a trial de novo. The defendant claimed that imposition of greater punishment for the same charge following his appeal to the court of general jurisdiction was a "vindictive" response to his decision to seek a post-conviction remedy. This Court rejected that contention, concluding that the sentencing system did not present "hazards warranting the restraints called for in *North Carolina* v. *Pearce*" (407 U.S. at 119). While the Court recognized that *Pearce* prohibited the imposition of "a more severe penalty after reconviction * * * as purposeful punishment for having successfully appealed," it did not believe that, in the situation before it, vindictive responses

would occur "with sufficient frequency to warrant the imposition of a prophylactic rule" (*id.* at 116). The Court saw no logical basis for adopting a presumption that the court of general jurisdiction, which resentenced the defendant following his trial de novo, would respond to the defendant's request for a trial de novo in a vindictive manner (*id.* at 117).

Similarly, in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), where a second jury imposed a more severe sentence on a defendant upon retrial following reversal of his original conviction, the Court refused to apply the prophylactic rule announced in *Pearce*. The Court concluded that the "hazard of vindictiveness" (*id.* at 25) is not present when a new jury imposes sentence following reconviction. While the Court recognized that a more severe sentence would be impermissible if its "only objective * * * is to discourage the exercise of constitutional rights" (*id.* at 33 n.20), it found that the "potential for such abuse of the sentencing process by the jury is * * * de minimis, in a properly controlled retrial" (*id.* at 26). In view of its conclusion that there was no "real threat of vindictiveness" in the case before it (*id.* at 28), the Court dismissed the suggestion that the risk of an enhancement of penalties after the exercise of a procedural right imposes an improper "chilling effect" on defendants (*id.* at 29-35). The Court noted that the defendant at bar "was not himself 'chilled' in the exercise of his right to appeal," and it expressed doubt that "the 'chill factor' will often be a deterrent of any significance" (*id.* at 33).

These cases make plain that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.' " *Perry*, 417 U.S. at 27. Accordingly, "[l]ike other 'judicially created means of effectuating the rights secured by the [Constitution],' "

this Court has "restricted application of *Pearce* to areas where its 'objectives are thought most efficaciously served.' " *Texas* v. *McCullough*, 475 U.S. 134, 138 (1986). "Given the severity of [the] presumption * * *—which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct—the Court has [applied the presumption] only in cases in which a reasonable likelihood of vindictiveness exists." *United States* v. *Goodwin*, 457 U.S. 368, 373 (1982).

B. Vindictiveness Should Not Be Presumed Where a Defendant Withdraws A Guilty Plea After He Has Been Sentenced, And Is Given an Increased Sentence After He Is Convicted At Trial

When a defendant withdraws his guilty plea after sentencing, and is thereafter convicted at trial, it is not unusual for a trial court to determine that a heavier sentence is warranted. For three related reasons, no presumption of vindictiveness should attach to that determination.[5]

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[5] The federal courts of appeals have held with near uniformity that a trial court may impose a harsher sentence on a defendant who has withdrawn his guilty plea and has thereafter been convicted at trial. See, *e.g.*, *McKenzie* v. *Risley*, 842 F.2d 1525, 1536-1537 (9th Cir. 1988) (en banc); *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1064-1065 (5th Cir. 1987), cert. denied, No. 87-5052 (July 7, 1987); *United States* v. *Carter*, 804 F.2d 508, 513-515 (9th Cir. 1986); *United States* v. *Townsend*, 796 F.2d 158, 164 (6th Cir. 1986); *Hitchcock* v. *Wainwright*, 770 F.2d 1514, 1518-1520 (11th Cir. 1985), rev'd on other grounds, 481 U.S. 393 (1987). As far as we can tell, the lone exception is the Eighth Circuit's decision in *United States* v. *Gilliss*, 645 F.2d 1269 (1981). The court in *Gilliss* held that a trial court could not resentence a defendant whose guilty plea had been set aside in a habeas corpus proceeding to a term of imprisonment that failed to specify (as did the prior sentencing) that the defendant would be eligible for early parole under 18 U.S.C. 4205(b)(1). The court reasoned,

1. While a defendant's guilty plea allocution may furnish relatively few details about the underlying offense, a trial on the merits often affords the sentencing court a detailed picture of the crime and the defendant's responsibility for it. In taking a guilty plea in the federal system, for example, Fed. R. Crim. P. 11(f) requires the trial court to make "such inquiry as shall satisfy it that there is a factual basis for the plea." See *McCarthy* v. *United States*, 394 U.S. 459, 467 (1969). That inquiry, however, need only be "precise enough and sufficiently specific to show that the accused's conduct on the occasion involved was within the ambit of that defined as criminal." *United States* v. *Johnson*, 546 F.2d 1225, 1226 (5th Cir. 1977). Accordingly, "Rule 11 does not mandate that the defendant personally confirm every factual allegation in the indictment" (*United States* v. *Trott*, 779 F.2d 912, 914 (3d Cir. 1985)), and indeed an otherwise valid guilty plea may be accepted even if the defendant during the colloquy denies factual guilt (*North Carolina* v. *Alford*, 400 U.S. 25 (1970)). What is more, the trial court need not question the defendant at length about his role in the offense; "[a] sufficient factual basis can be found even when the court engages in the most rudimentary questioning of the defendant if the indictment and statement of the prosecution's evidence are sufficiently specific to make clear to the defendant exactly what is being admitted to" (*United States* v. *Fountain*, 777 F.2d 351, 355 (7th Cir. 1985), cert. denied, 475 U.S. 1029 (1986)).

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in part, that a trial court may not alter a prior sentence based simply on the fact that the trial on the merits has provided a more damaging picture of the offense. See 645 F.2d at 1284 & n.34. As we explain below (see pages 14-17, 23-24, *infra*), the Eighth Circuit's reasoning cannot be squared with the premises underlying *North Carolina* v. *Pearce*, or, more specifically, with the explicit holding in *Texas* v. *McCullough*, 475 U.S. 134 (1986).

Even when supplemented by a presentence report—containing, in the federal system, "information about the history of the defendant, including * * * any circumstances affecting his behavior" (Fed. R. Crim. P. 32(c)(2)(A))—a guilty plea allocution will seldom, if ever, provide as detailed an account of the crime as would a trial on the merits. The present case illustrates the point. The trial court explained that at the time of respondent's plea, it knew of only "one sex act [that] took place" (C.A. App. R-400). As a result of the trial, however, the court stated that it had become "aware that five separate sex acts occurred" (*ibid.*), including two acts of sodomy (*id.* at R-140) and three acts of intercourse (*id.* at R-402), each of which had been accompanied by armed threats on the victim's life (*ibid.*). Indeed, in light of the trial testimony the court suggested that the sentence following the guilty plea "may not have been harsh enough" (*id.* at R-411).

In addition to presenting a more detailed account of the crime generally, a trial on the merits will typically involve charges that were dismissed as part of the prior plea bargain and which were therefore not before the trial court when it initially sentenced the defendant. The "federal courts have generally held that a defendant who successfully challenges his guilty plea may be reindicted on the original charges, and if convicted, sentenced more severely." J. Bond, *Plea Bargaining and Guilty Pleas*, § 7.28(a), at 7-100 (1983) (footnote omitted).[6] In the present case, for example, the State moved to dismiss the

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[6] See, *e.g.*, *United States* v. *Townsend*, 796 F.2d 158, 164 (6th Cir. 1986); *United States* v. *Johnson*, 537 F.2d 1170, 1174-1175 (4th Cir. 1976); *United States* v. *Anderson*, 514 F.2d 583, 587-588 (7th Cir. 1975); *United States* v. *Rines*, 453 F.2d 878, 880 (3d Cir. 1971); *United States ex rel. Williams* v. *McMann*, 436 F.2d 103, 104-107 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971).

sodomy charge, as part of its plea bargain with respondent. When respondent successfully withdrew from the plea bargain, the sodomy charge was reinstated and tried to conviction. The trial court was therefore in a position, following the trial, to take account of a serious charge that was not before it when it previously sentenced respondent. The sodomy charge not only justified a substantial sentence wholly apart from the sentence imposed on the other two charges, but it helped complete the picture of the crime for the trial court and thus justified increased sentences on the rape and burglary charges as well.

Moreover, where, as here, a defendant testifies at trial, the trial on the merits will afford the sentencing court a more extensive opportunity to assess the defendant's attitude toward his offense, and therefore the defendant's moral culpability and susceptibility to rehabilitation. "[T]he trial judge's 'opportunity to observe the defendant, particularly if he chose to take the stand in his defense, can often provide useful insights into an appropriate disposition.' " *United States* v. *Grayson*, 438 U.S. 41, 50 (1978) (citation omitted). For example, a trial court is lawfully entitled to sentence a defendant more harshly if he has testified falsely at trial. *Id.* at 50-52; United States Sentencing Comm'n, *Sentencing Guidelines and Policy Statements* § 3C1.1, at 3.7 (1987). As this Court has noted, "it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision." *United States* v. *Grayson*, 438 U.S. at 53. The trial court in the present case apparently exercised that discretion, explaining that it had increased respondent's sentences in part because of respondent's "mental outlook" on the crime and his "position during the trial and what [he] said" (C.A. App. R-402).

In short, a trial on the merits will typically afford the sentencing court a more complete picture of the offense and of the defendant's responsibility for it. For that reason, there is no basis for presuming that a harsher sentence following a trial is the product of vindictiveness. The more likely explanation is that the court has reached a different, and better informed judgment about the appropriate level of punishment, based on "the details, flavor and impact upon victims of the offense as presented at trial" (*United States* v. *Carter*, 804 F.2d 508, 514 (9th Cir. 1986)). Accordingly, in this setting, the realistic "hazard of vindictiveness * * * is de minimis" (*Chaffin* v. *Stynchcombe*, 412 U.S. at 25-26), and the *Pearce* presumption should not be applied.[7]

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[7] "Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation." *Hitchcock* v. *Wainwright*, 770 F.2d at 1519. See also *United States* v. *Cunningham*, 529 F.2d 884, 889 (6th Cir. 1976) (increased sentences following trial reflect "the sentencing judge's greater knowledge and better understanding acquired after hearing the full disclosure of the facts at the trial on the merits"). Cf. *Blackmon* v. *Wainwright*, 608 F.2d 183, 184 (5th Cir. 1979), cert. denied, 449 U.S. 852 (1980) (increased sentence following trial may reflect the fact that the trial court "had the benefit of hearing all of the trial testimony and may have based the sentence on the facts surrounding the robbery and the evidence of [the defendant's] guilt"); *United States* v. *Underwood*, 588 F.2d 1073, 1078 (5th Cir. 1979). As one court of appeals has summarized the point (*United States* v. *Derrick*, 519 F.2d 1, 4 (6th Cir. 1975)):

> [I]n a plea of guilty, the crime pleaded is understood only as related in somewhat sterile fashion through the plea taking process or through a printed narration in the pre-sentence report. The sentencing following a trial upon the merits, on the other hand,

2. Beyond this, a defendant who elects to acknowledge responsibility and plead guilty "demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady* v. *United States*, 397 U.S. 742, 753 (1970). Such a defendant has "taken the first and arguably essential step toward rehabilitation and would therefore require less lengthy confinement and treatment than a defendant similar in all other respects but adamant in his protestations of innocence." J. Bond, *Plea Bargaining and Guilty Pleas* § 2.7(c), at 2-22 (1983). "It is almost axiomatic," one court has observed, "that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault * * *." *Gollaher* v. *United States*, 419 F.2d 520, 530 (9th Cir.), cert. denied, 396 U.S. 960 (1969).

For that reason, this Court's cases "unequivocally recognize the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstated those attributes on which leniency is based." *Corbitt* v. *New Jersey*, 439 U.S. 212, 224 (1978) (footnote omitted). Accord *Brady*, 397 U.S. at 753. The lower federal courts have likewise held that "[a] genuine admission of guilt may properly result in a lighter sentence than would be ap-

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sees the trial judge in possession not only of more of the detailed facts of the offense itself, but of the flavor of the event and the impact upon any victims. It is for that reason a more real and accurate appraisal of the circumstances which brought the defendant to the bar of justice, and almost inevitably this added knowledge will affect the judge's consideration of what penalty appears most appropriate. This can, of course, work to the benefit or the detriment of the defendant according to the degree of culpability shown by the proofs.

propriate for an intransigent and unrepentent malefactor." *United States* v. *Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), cert. denied, 411 U.S. 948 (1973). A trial judge is therefore entitled "to take into account the difference in mental attitude between the defendant who admits his guilt and seeks to reform and the defendant who, although proved guilty beyond a reasonable doubt, gives no indication of his willingness to be rehabilitated." *United States* v. *Derrick*, 519 F.2d at 4. Thus, although "[a]n accused may not be subjected to more severe punishment for exercising his constitutional right to stand trial" (*United States* v. *Carter*, 804 F.2d at 513; accord *United States* v. *Hutchings*, 757 F.2d 11, 14 (2d Cir.), cert. denied, 472 U.S. 1031 (1985)), a court may impose a lighter sentence when it concludes, based on a defendant's guilty plea and allocution, that he has accepted responsibility for the offense (see, *e.g.*, *United States* v. *Sampol*, 636 F.2d 621, 678 (D.C. Cir. 1980)). See generally *Roberts* v. *United States*, 445 U.S. 552 (1980).[8]

In the federal system, the Sentencing Guidelines explicitly approve that principle. Section 3E1.1(a) of the Guidelines and the accompanying commentary provide that although a defendant who pleads guilty is not entitled to a sentencing reduction "as a matter of right," the plea "may provide some evidence of the defendant's acceptance of responsibility" and may therefore justify a

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[8] See also American Bar Association Project on Minimum Standards for Criminal Justice, *Pleas of Guilty* § 1.8 and commentary at 36-52 (Approved Draft, 1968). In addition to reflecting a measure of contrition, a plea of guilty also permits prompt and certain, and therefore more effective, punishment. That, in turn, may further justify a reduction in the severity of the punishment. See Becker, *Crime and Punishment: An Economic Analysis*, 76 J. Pol. Econ. 169, 177-178 (1968); Bentham, *Principles of Penal Law*, Pt. II, Bk. 1, ch. 6, in 1 *Bentham's Works* 401 (Bowring ed. 1843).

reduction in the offense level on which the sentence will be based. *Sentencing Guidelines* § 3E1.1.(a), (c), Commentary at 3.21 (Jan. 1988). The Guidelines explain that "a defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense * * * is appropriately given a lesser sentence than a defendant who has not demonstrated sincere remorse." *Id.* at 3.22.

Because a trial court may lawfully give a lesser sentence to a defendant who pleads guilty, a reviewing court should not presume vindictiveness simply because a trial court has given a harsher sentence to a defendant who elects to go to trial. The rule in *Pearce* was not designed to preclude sentencing courts from taking into account a defendant's willingness to accept responsibility for his offense.

3. These first two principles suggest a third, more general one: a presumption of vindictiveness in this context is fundamentally incompatible with the accepted role of plea bargaining in the criminal justice system. "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). As this Court has repeatedly explained, the "[d]isposition of charges after plea discussions is not only an essential part of the [criminal justice] process but a highly desirable part for many reasons." *Santobello* v. *New York*, 404 U.S. 257, 261 (1971). "For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof." *Brady* v. *United States*, 397 U.S. 742, 752 (1970).

The decision below is incompatible with a rational plea bargaining system. As Justice Maddox explained in dissent, under the majority's view a defendant would be "allowed to receive sentence concessions in return for a guilty plea and then, after a successful attack on that plea, bind the State to its original sentencing bargain if he is later convicted after a trial" (Pet. App. 14). Such an approach "would encourage gamesmanship of a most offensive nature"—what the Second Circuit has called "nothing more than a 'heads-I-win-tails-you-lose' gamble." *United States ex rel. Williams* v. *McMann*, 436 F.2d 103, 106-107 (1970), cert. denied, 402 U.S. 914 (1971). The original sentence would thereby become the defendant's baseline, and he could "go to trial and chance an acquittal knowing he could receive a sentence no harsher than he was originally given" (Pet. App. 14).

Nothing in this Court's cases requires the plea bargaining system to absorb such costs. To the contrary, the Court has repeatedly held that a presumption of vindictiveness is inappropriate where plea negotiations are involved. Thus, in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), the Court held that it was permissible for the prosecutor to threaten the defendant with increased charges if the defendant did not plead guilty, and to follow up on that threat when the defendant insisted on his right to stand trial. At the pretrial stage of the prosecution in which the prosecutor engaged in "give-and-take negotiation common in plea bargaining" (*id.* at 362), the Court found no element of improper "punishment or retaliation" (*id.* at 363). The Court recognized that the prosecutor has

a legitimate interest at the bargaining table in persuading the defendant "to forgo his right to plead not guilty" (*id.* at 364).

Similarly, in *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978), this Court upheld a state sentencing scheme that authorized more lenient sentences for defendants who pleaded guilty in homicide cases. The Court reiterated that the government has a "legitimate interest" (*id.* at 222) in encouraging guilty pleas and affirmed the "constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based" (*id.* at 224). Since this differential penalty scheme served "the interest of the State in efficient criminal procedure" (*id.* at 220 n.9) and was not a "needless or arbitrary burden on the [exercise of] constitutional rights" (*id.* at 223), the Court found no occasion for a presumption of malice or vindictiveness. See also *United States* v. *Goodwin*, 457 U.S. 368 (1982).

These cases make clear that the government has a legitimate interest in encouraging guilty pleas by offering favorable terms that it does not make available to defendants who proceed to trial and are convicted. Just as the government may legitimately make a better offer to defendants who agree to plead guilty, it may also treat less favorably (but nevertheless nonvindictively) those defendants who are convicted at trial. The *Pearce* presumption has no place in that calculus.

C. Even If A Presumption Of Vindictiveness Were Appropriate, That Presumption Was Easily Overcome In This Case

The trial court in this case offered a persuasive explanation, other than vindictiveness, for increasing respondent's sentence on the burglary charge. It stated that "at the time

of the plea, [it] was aware * * * that only one sex act took place"; after the trial, the court noted, it became "aware that five separate sex acts occurred" (C.A. App. R-400). The Alabama Supreme Court held (Pet. App. 4), however, that respondent's sentence could not be increased on that basis. It reasoned that the trial court's "subjective observations" gleaned from the trial did not constitute objective "events subsequent to the [respondent's] first conviction." Accordingly, it held that under the *Pearce* case the trial court's explanation did not overcome the presumption of vindictiveness.

That is precisely the argument this Court rejected in *Texas* v. *McCullough*, 475 U.S. 134 (1986). The defendant in that case was convicted and sentenced by a jury to 20 years' imprisonment. The trial court then granted the defendant's motion for a new trial, and defendant was again convicted. This time, the defendant chose to be sentenced by the court, which imposed a sentence of 50 years. In revising the sentence, the court relied, in part, on certain testimony, not presented at the first trial, which showed that the defendant, rather than his accomplices, had slashed the throat of the victim. This Court held that the trial court's findings had overcome any presumption under *Pearce*. The Court acknowledged the language in *Pearce* stating that the presumption of vindictiveness may be rebutted with evidence of " 'conduct or events that occurred subsequent to the original sentencing proceedings' " (*id.* at 141 (citation omitted)). It explained (*ibid.*), however, that "[t]his language * * * was never intended to describe exhaustively all of the possible circumstances in which a sentence increase could be justified." Instead, the Court stated, the *Pearce* presumption may be overcome by any " 'objective information * * * justifying the increased sentence' " (*id.* at 142 (citation omitted)). Applying that principle, the Court held

that the trial court's findings—including, in particular, " '[t]he testimony of * * * two witnesses directly implicat[ing] the defendant in the commission of the murder in question and show[ing] what part he played in committing the offense' " (*id.* at 143 (citation omitted))—were sufficient to rebut any possible presumption of vindictiveness.

The present case is controlled by *McCullough*. Here, too, the trial court justified its increased sentences by referring to "new evidence about the [crimes] that was not presented" at the time of the guilty plea and was "hence never made known to the sentencing" court the first time around (475 U.S. at 136). Moreover, the trial court was able to take into account after the trial the defendant's attitude regarding the offense and his testimony in which he offered a alibi defense and charged that the police had obtained a false confession from him. Under the reasoning of *McCullough*, the trial court's findings amply rebutted any possible inference of vindictiveness.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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